STATE OF MICHIGAN
IN THE SUPREME COURT

ALIAMA X. SCHAUMANN-BELTRAN,

Plaintiff-Appellant,

v.

JOSEPH GEMMETE, M.D.M

Defendant-Appellee,

Supreme Court No. 162507

Court of Appeals No. 347683

Washtenaw County Circuit Court No. 17-000132-NH

ALIAMA X. SCHAUMANN-BELTRAN,

Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, d/b/a UNIVERSITY OF MICHIGAN HEALTH SYSTEM (a/k/a Michigan Medicine), UNIVERSITY OF MICHIGAN MEDICAL CENTER, and C.S. MOTT CHILDREN'S HOSPITAL,

Defendants-Appellees.

Court of Appeals No. 347684

Court of Claims No. 17-000038-MH

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BRIEF AMICUS CURIAE OF
MICHIGAN ASSOCIATION FOR JUSTICE

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The Michigan Association for Justice recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents a novel issue of law, and the Court's decision could have far-reaching consequences that affect all cases in which a medical examination is ordered.

STATEMENT OF FACTS

This is a medical malpractice action brought by Plaintiff Aliama Schaumann-Beltran against Defendants Dr. Joseph Gemmete, Michigan Medicine, the University of Michigan Medical Center, and C.S. Mott Children's Hospital. During the proceedings, Defendants sought to obtain a neuropsychological evaluation of Plaintiff, who was a minor at the time. (12/10/20 COA Opinion, p. 2; 12/06/18 Hearing, p. 9). The parties disagreed, however, about whether Plaintiff's attorney should be permitted to attend and whether the evaluation should be videorecorded. (12/10/20 COA Opinion, p. 2).

The Trial Court concluded that the least intrusive way to ensure the examination was conducted properly and that Plaintiff would be able to appropriately challenge any adverse findings was to have the examination be videorecorded. (01/25/19 Order). The Court of Appeals, however, reversed, concluding that it would *never* be appropriate for a trial court to allow the videorecording of a physical or mental examination. (12/10/20 COA Opinion).

[1] No counsel for any party has authored this brief in whole or in part and no such counsel or party or any person other than the amicus curiae, its members, or its counsel has made a monetary contribution to fund its preparation or submission.

Plaintiff then sought leave to appeal to this Court.

ARGUMENT

I. Michigan trial courts must retain their discretion to specify the "conditions" of a physical or mental examination of a party, including whether it will be recorded, because to hold otherwise would be contrary to the discovery purpose of ensuring the provision of accurate information and instead aids in the concealment of the basis for the opinions of a defense expert.

This Court has long recognized that the purpose of discovery is to "provide accurate information in advance of trial as to the actual facts and circumstances of a controversy." *Ewer v Dietrich*, 346 Mich 535, 541; 78 NW2d 97 (1956). Discovery rules are intended to "promote the discovery of the true facts and circumstances of a controversy, rather than aid in their concealment." *Id.* at 542.

Although never addressed by this Court, the issue presented by this case—whether a trial court may order the videorecording of an involuntary medical examination, to ensure both sides of the controversy have access to accurate information—is not new. Courts across the country have grappled with this issue, and nearly every state court that has addressed the issue has determined that videotaping a medical examination on the patient's request is at least permissible, and perhaps even a right to which the patient is *entitled*. The reasons are several. First, the only reason an "independent" medical examination is allowed to be ordered to begin with is to ensure that parties have access to equal and accurate information. A videorecording of the examination furthers that purpose by ensuring that the actual fact of what happened at the examination is not subject to dispute. Second, medical examinations by a defense-hired doctor are inherently adversarial and an unrecorded examination would allow the examination to be used as a de facto deposition without

the plaintiff having the benefit of counsel. Third, a recording is essentially simply a more accurate and easier form of "note-taking," and it is unlikely to disrupt the examination.

Michigan's court rule on the issue, MCR 2.311, provides,

> (A) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. **The order must specify the time, place, manner, *conditions*, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination**.

(emphasis added). This rule is similar to Federal Rule of Civil Procedure 35, but notably adds that the party's attorney may be permitted to be present. The court rules of most states contain a similar provision, with some slight differences depending on state.

One of the more useful discussions of this issue can be found in the Oklahoma Supreme Court's opinion in *Boswell v Schultz*, 175 P3d 390 (Okla 2007). Oklahoma's civil procedure statute provides, in relevant part:

> C. ORDER FOR EXAMINATION. When the physical, including the blood group, or mental condition of a party, or a person in the custody or under the legal control of a party, is in controversy but does not meet the conditions set forth in subsection A of this section, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for such examination the agent, employee or person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties. **The order shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made**.

> D. REPRESENTATIVE MAY BE PRESENT. **A representative of the person to be examined may be present at the examination**.

12 OK Stat § 12-3235 (2014). The statute, like the Michigan court rule, allows a court to specify the conditions of a medical examination, but does not expressly allow videorecording.

The Oklahoma Supreme Court held that videorecording was permissible as a "condition" of the examination. In doing so, the Court relied upon well-established principles of discovery that strongly reflect Michigan's own policies:

> **The purpose of modern discovery practice and procedure is to promote the discovery of the true facts and circumstances of the controversy, rather than to aid in their concealment**.
>
> . . .
>
> The purposes of the discovery statute are to facilitate and simplify identification of the issues by limiting the matters in controversy, avoid unnecessary testimony, promote justice, provide a more efficient and speedy disposition of cases, eliminate secrets and surprise, prevent the trial of a lawsuit from becoming a guessing game, and lead to fair and just settlements without the necessity of trial. Discovery statutes permit obtaining of evidence in the sole possession of one party which is unavailable to opposing counsel through the utilization of independent means. For these reasons, the rules dealing with discovery, production, and inspection are to be liberally construed. The intent of the Oklahoma discovery statutes is to attempt to provide procedures which **promote accurate information in advance of trial concerning the actual facts and circumstances of a controversy, rather than to aid in its concealment**. The utilization of discovery enables attorneys to better prepare and evaluate their cases. **Ascertainment of truth and the ultimate disposition of lawsuit is better accomplished when parties are well educated through discovery as to their respective claims in advance of trial. Pretrial discovery procedures are intended to enhance truth-seeking process, and good faith compliance with such procedures is both desirable and necessary**.

Boswell, 175 P3d at 395 (emphasis added).

The Court explained that the use of involuntary medical examinations was actually disfavored in the 1800s. *Id.* at 393. This changed primarily because courts became persuaded that "the object of all court litigation was, as far as possible, to arrive at the truth and administer justice" and "when persons appeal to the courts for justice, they are impliedly agreeing to make any disclosures which are necessary to be made in order that justice may be done." *Id.* The Oklahoma Supreme Court noted that its statute allowing the use of independent medical examinations favored "the rights of the party seeking the examination to fully investigate and prepare its case, to ascertain whether the plaintiff actually has the injuries which are alleged to have been caused by a defendant." *Id.* at 394. But "[t]he obvious counterpoint of allowing a 'full investigation' would be to make certain that the injured party has an accurate and complete record of the proceeding, and to allow the party undergoing an examination to have reliable proof that the examiner is unbiased and not merely a shill for the opposing party." *Id.* Allowing all parties access to accurate information necessitates not only that the defendant be able to examine the plaintiff, but that the plaintiff have an accurate record of the examination, as a basis for challenging the examiner's findings and conclusions. "Allowing an electronic recording would expose the true facts and strike a balance to prevent either a false claim or a cursory exam." *Id.* "A video recording [is] a superior method of providing an impartial record of the physical examination." *Id. See also Langfeldt-Haaland v Saupe Enterprises, Inc*, 768 P2d 1144 (Ala 1989) (where the Alaska Supreme Court held that videorecording is permitted as a matter of course).

The Indiana court rule is similar, except for that it does not expressly allow a representative to attend an examination:

> (A) Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a

> physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and **shall specify the time, place, manner, *conditions*, and scope of the examination and the person or persons by whom it is to be made**.

Ind R Trial P 35 (emphasis added). The Indiana Supreme Court discussed several concerns with the prospect of an unrecorded examination before concluding that recording such examinations is permissible. First, any statements made by the plaintiff during the examination may be used against the plaintiff in court when the physician testifies. *Jacob v Chaplin*, 639 NE2d 1010, 1012 (Ind 1994). Thus, it is important for the plaintiff to preserve an accurate, verbatim record, much like with a deposition. *Id.* Second, the examining physician is generally someone hired by the defendant, and allowing an unsupervised, unrecorded examination could amount to a de facto, unrestricted deposition of the plaintiff without counsel. *Id.* at 1012-1013.

Lastly, the Indiana Supreme Court observed that the plaintiff is obviously already present for the examination and recording the examination is simply akin to allowing the plaintiff to take notes of it:

> The T.R. 35 medical examination is a court-ordered medical evaluation of a person whose health status is at issue in a case. The examination, by its nature, requires a verbal exchange between examiner and examinee. The purpose of the examination is to further the litigation process. An opinion arrived at by the examiner is intended to aid the trier of fact in making a damages assessment. Statements made by the examinee are intended to aid the examiner in arriving at a proper opinion, and, by necessity, are material to such trial issues as proximate cause. It is inherent in such an important meeting that both examiner and examinee be permitted to choose whether or not to make written notes of the verbal exchange. It follows from this conclusion that both should as well be permitted to choose whether or not, in lieu of the laborious process of making notes, to openly record the verbal exchange by electronic means.

Id. at 1013. Indeed, if a plaintiff had perfect memory, they could already relay every word said and action taken to their attorney after the examination is conducted. A recording merely ensures perfect accuracy and eliminates the credibility contest between plaintiff and physician. The Florida Supreme Court agreed with this reasoning, noting that "Plaintiffs' attorneys are understandably uncomfortable with a swearing contest at trial between an unsophisticated plaintiff and a highly trained professional with years of courtroom experience." *US Security Insurance Co v Cimino*, 754 So2d 697, 702 (2000). *See also Rochen v Huang*, 558 A2d 1108 (Del Super 1988) (a Delaware trial court arriving at the same conclusion); *BD v Carley*, 704 A2d 979 (NJ Super App Div 1998) (New Jersey appellate division arriving at the same conclusion).

The Kentucky Supreme Court surveyed the many cases across the country dealing with this issue and concluded that federal courts (albeit only district courts) are less likely to allow videorecording of examinations than state courts. *Metro Property & Casualty Insurance Co v Overstreet*, 103 SW3d 31 (Ky 2003). It attributed the distinction to a difference in how courts perceive an independent medical examination. Federal courts had a greater tendency to perceive the examination as objective and scientific. *Id.* at 37-38. State courts, on the other hand, although recognizing that the examination would ideally be purely scientific, are more likely to acknowledge the reality that the examination is inevitably an arena joined with the litigation itself. *Id.* at 38. The Kentucky Supreme Court joined most other states in concluding that the examining physician will "nearly always be hired with an adversarial mindset." *Id.* It held that videorecording of an examination was permitted if the plaintiff alleged good cause for such a condition. *Id.*

The Kentucky Supreme Court also recognized that the potential effect a video recorder would have on an examination, compared to the presence of an attorney, is minimal. *Id.* at 39-40. Thus, it is actually the preferred method of ensuring an examiner's proper conduct and preserving

an accurate record. *See also State ex rel Hess v Henry*, 393 SE2d 666 (W Va 1990) (where the West Virginia Supreme Court reached a similar conclusion). There are several other states that allow videorecording of an examination if the plaintiff shows good cause. *In re Soc'y of Our Lady Trinity*, 622 SW3d 1 (Tex App 2019); *Lindell v Kalugin*, 297 P3d 1266 (Or 2013). And some simply hold that it is a matter within the trial court's discretion. *Astill v Clark*, 956 P2d 1081 (Utah Ct App 1998). Courts have held that good cause may be established by, for example, proof that the examiner has historically been biased against examinees, *Overstreet*, 103 SW3d at 40, or the fact that the examinee is a minor or has a disability that may prevent the examinee from reporting what occurs to counsel, *In re Soc'y of Our Lady Trinity*, 622 SW3d at 15.

Notably, all of the above referenced cases permit videorecording under at least some circumstances even though it is not expressly provided for in the state's court rules. Other states, such as Arizona and Washington, allow videorecording expressly in the court rules. Ariz R Civ P 35(c)(2); Wash CR 35(a)(3). Federal courts are divided on whether they allow the videorecording of a medical examination, but at least some have permitted it, as well. *See, e.g.*, *Zabkowicz v. West Bend Co*, 585 F Supp 635 (ED Wis 1984).

This Court should join the majority of states in interpreting Michigan's court rule to allow the videorecording of medical examinations, subject to the trial court's discretion, as a "condition" of the examination. Michigan's court rule, like those of most states, expressly allows the trial court to "specify the time, place, manner, *conditions*, and scope of the examination and the person or persons by whom it is to be made, **and** may provide that the attorney for the person to be examined may be present at the examination." MCR 2.311 (emphasis added). The Court of Appeals appears to have relied upon the canon of "*expressio unius est exclusio alterius*" when it concluded that because the court rule expressly provides that the trial court may order that an attorney be present,

the rule does not allow a trial court to order that the examination be recorded. (12/10/20 COA Opinion, pp. 5-7). This is, however, an incorrect application of the canon.

The "*expressio unius*" canon "has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v Peabody Coal Co*, 537 US 149, 168 (2003). There is no reason to believe that the presence of an attorney and the videorecording of an examination are so naturally associated that the court rule's mention of one was intended to exclude the other. Indeed, the court rule expressly allows the trial court to specify "conditions" of examinations, **and** allow an attorney to be present. If no additional condition is permitted other than that the attorney be permitted to be present, then the word "conditions" would be mere surplusage. *See, e.g.*, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). A fairer reading of the court rule is simply that the trial court has the discretion to order any condition that may be appropriate, which may include an order that the party's attorney be permitted to attend.

Defendants-Appellees suggest that the videorecording of a psychological examination goes against the profession's ethical guidelines and threatens the reliability of the examination. But not all professionals oppose the practice. The American Academy of Psychiatry and the Law produced a practice guideline, revised in May 2013, which concludes that videorecording examinations conducted for the purpose of court proceedings is "an ethically acceptable medical practice." AAPL Task Force, *Video Recording of Forensic Psychiatric Evaluations* (2013), available at https://www.aapl.org/docs/pdf/VIDEO%20RECORDING%20GUIDELINE%202013.pdf.[2]

[2] It is worth considering that the justices of the United States Supreme Court believe that videorecording of their oral arguments would negatively impact their proceedings. *See, e.g.*, Kessler, *Why Aren't Cameras Allowed at the Supreme Court Again?* (2013), available at https://www.theatlantic.com/national/archive/2013/03/case-allowing-cameras-supreme-court-

Moreover, when an examination is conducted for the purposes of litigation, there are likely numerous factors that could impact its reliability. If a party being examined is affected by the presence of a videocamera, surely, that party may just as well be affected by the knowledge that the examination is being conducted for the purpose of litigation. And if the examiner is affected by the presence of a camera, surely, the examiner could just as likely be affected by the fact that the examiner is working for the defense and is expected to assist the defense with their litigation purpose. Indeed, the presence of a camera could just as likely encourage greater reliability by encouraging the examiner to conduct the examination properly. It also allows the reliability of the examination to be properly assessed, as an attorney watching the video can see demeanor and hesitation. The reduction of the examination to a report written by the defense expert unfairly masks the biases inherent in the process and limits the ways in which the plaintiff may challenge the results.

It is worth noting that the position advocated by the Defendants-Appellees in this case is contrary to the Michigan court rule itself and would be significantly prejudicial to a plaintiff who has, for example, memory problems, or difficulty communicating. That is, Defendants-Appellees do not argue that the videorecording of an examination is worse than the attendance of that examination by the plaintiff's counsel—which is expressly permitted by court rule. Instead, Defendants-Appellees argue that neither should be allowed—which is directly contrary to the court rule. In a situation in which the plaintiff cannot be relied upon to report the details of the examination accurately to his or her attorney, the defense expert will be the only person able to

proceedings/316876/. Yet, this Court's own oral arguments are videorecorded and available on the Court's YouTube channel.

speak as to what happened at that examination, which unfairly impacts the plaintiff's ability to challenge the results of the examination.

The Michigan court rule strikes an appropriate balance by allowing a trial court to specify the "conditions" of an examination. This Court should interpret the rule to leave trial courts with broad discretion to determine whether to allow videorecording of an examination. In this case, the plaintiff was a minor at the time of the examination who also had a history of mental health problems. (12/06/18 Hearing, p. 9). At the very least, these circumstances justify a trial court exercising its discretion to allow the least intrusive protection of the plaintiff's interests—a videorecording of the examination.

REQUEST FOR RELIEF

Amicus Curiae Michigan Association of Justice respectfully requests that this Court reverse the Court of Appeals' decision or grant leave to appeal.

February 25, 2022

Respectfully submitted,

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